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No. 08- 08-853

IN THE

Supreme Court of the United States

BRUCE ZESSAR,

Petitioner,

v.

JOHN R. KEITH, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CLINTON A. KRISLOV
Counsel of Record
JEFFREY M. SALAS
KRISLOV & ASSOCIATES
20 North Wacker Drive
Suite 1350
Chicago, IL 60606
(312) 606-0500

Counsel for Petitioner

220221

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a plaintiff's achievement of summary judgment on the merits is a sufficient "alteration of legal relationship" under this Court's decision in *Buckhannon Board and Care Home Inc. v. West Virginia Dept. of Health*, 532 U.S. 598 (2001) to entitle the plaintiff to "prevailing party" status, and attorneys fees, under the Civil Rights Attorneys Fees Awards Act of 1976, codified as 42 U.S.C. § 1988, despite the defendants' subsequently mooting the case by enacting corrective legislation explicitly attributed to the litigation, prior to the entry of a Fed. R. Civ. P. 58 final judgment?

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The opinion and order of the district court (per Coar, D.J.) (Appendix ("Pet. App. __"), Pet. App. A) entering final judgment against Respondent. The opinion of the court of appeals (per Manion, joined by Flaum and Tinder) reversing the district court's decision (Pet. App. B) and is reported at 536 F.3d 788. The court of appeals' order denying rehearing en banc (Pet. App. C) is not reported.

JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331. The judgment of the court of appeals was entered on August 8, 2008. A timely petition for rehearing en banc was denied on October 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988

"(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000

> [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."

STATEMENT OF THE CASE

1. *Nature of the Case*

Petitioner's 2004 general election absentee ballot was rejected by the Lake County, IL election judges on election night, yet he was not notified of the rejection until 2 1/2 months later. At that time, Illinois law neither required timely notice nor provided any opportunity to be heard to defend one's ballot even though the official count would never occur for at least two weeks.

Zessar brought this Civil Rights action in the United States District Court (N.D. Ill.) to challenge Illinois' lack of timely notice and any provision for a hearing to defend the voter's ballot. After certifying the case to proceed as a class action, the District Court granted summary judgment to Petitioner on the merits, holding that Illinois' lack of timely notice and opportunity for a hearing to defend one's ballot prior to the final ballot

count ("canvass") did constitute a deprivation of his constitutional right to vote without due process, and ordered the parties to present proposed procedures to protect absentee voters' due process rights.

Instead, but before the court ruled on ultimate relief and judgment, the Illinois legislature enacted legislation requiring notice within 48 hours and the opportunity to appear in person to defend one's ballot[1] and defendants moved to dismiss the case as moot. Although the District Court ruled that the defendants' actions had mooted the case, it nonetheless held that the Petitioner's achieving summary judgment on the merits constituted sufficient alteration of the parties' legal relationship, entitling him to attorneys' fees under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. § 1988.

On the appeal by the State and County election officials, the Seventh Circuit, interpreting this Court's *Buckhannon*[2] decision, held that the mooting of the case prior to entry of final judgment deprived the plaintiff of "prevailing party" status, and reversed the order of entitlement to attorneys' fees.

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[1] The number of affected voters, historically about one per precinct, is a significant number; and the result since then has been that virtually every rejected voter who has chosen to defend their ballot has succeeded in having their ballot counted. While petitioner did not seek money damages, the only manner in which his complaint was not addressed, was that persons in military service or similarly incapable of appearing in person should be afforded a way to defend their ballot, by facsimile, mail or internet.

[2] *Buckhannon Board and Care Home Inc. v. West Virginia Dep't of Health*, 532 U.S. 598 (2001).

REASONS FOR GRANTING THE PETITION

There is an irreconcilable split among the Circuits that this Court needs to resolve.

The Seventh Circuit's holding that Petitioner's achievement of summary judgment on the merits is insufficient for "prevailing party" status, clashes with holdings of the First, Second, Third, Fifth, Sixth, Eighth, Ninth, Eleventh and D.C. Circuits that a merits-based decision *at any stage* can confer prevailing party status to a plaintiff where a defendant thereafter mooted the case by either amending the challenged statute or permanently changing the policies prior to entry of final Rule 58 judgment.

The Seventh Circuit's "final judgment" standard also wrongly provides the perverse incentive for defendants to litigate all cases, regardless of merit, to wear down plaintiffs, right up to the instant before final judgment, diminishes an important incentive that Congress intended to provide in order to ensure that important cases such as this one are litigated, by and conversely deters plaintiffs from asserting such claims (in fact deters lawyers from accepting such representation) because any defendant will always be able to evade paying fees by mooting the case at any time prior to entry of final judgment.

I. The Seventh Circuit's Decision Conflicts with All Reported Decisions of the United States Courts of Appeals for Other Circuits Holding that a Defendant's Mooting the Case by Capitulating to Plaintiff's Position After Even a Nonfinal Adjudication of the Merits May Satisfy Prevailing Party Status

The Seventh Circuit's "final judgment on the merits" requirement[3] for "prevailing party" status conflicts with all other reported majority of Circuits' holdings that achievement of any decision on the merits of the claim is generally sufficient for "prevailing party" status, even where the defendant thereafter "moots" the claim by subsequently amending the statute or permanently changing its policies prior to entry of a final Rule 58 judgment.

A. The Third, Fifth and Ninth Circuits hold that a Preliminary Ruling on the Merits may satisfy *Buckhannon*, Even Without Entry of Final Judgment.

The Third, Fifth and Ninth Circuits all hold that a favorable ruling on the merits may be sufficient to satisfy "prevailing party" status over the defendants'

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[3] The Seventh Circuit also ignored its own prior case law recognizing a final judgment is not required for Petitioner to be a prevailing party. *See, Palmetto Props., Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004) (conferring prevailing party status on plaintiff that succeeded on a preliminary injunction despite defendant amending the statute and mooting the case prior to final judgment).

subsequent mooting of the claim. See: *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 232 (3d Cir. 2008); *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008) and *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002).

The Third Circuit, in *People Against Police Violence v. City of Pittsburgh*, 520 F.3d at 235, held that plaintiffs were prevailing parties where the district court granted plaintiffs' motion [for interim injunctive relief] and issued a preliminary injunction which prohibited the City from enforcing the challenged ordinance and imposed temporary procedures . . . "until the City passed a new ordinance." *Id.* Like here, the district court also ordered the city to submit its proposed revisions to the ordinance to the court and held that the plaintiff was a prevailing party.

The Third Circuit affirmed the district court's holding that plaintiffs were a prevailing party and rejected the defendants' argument that the voluntary amendment to the statute – after it was deemed unconstitutional – lacked the judicial imprimatur to confer prevailing party status, articulating that "[a]t the end of the proceedings, plaintiffs had achieved precisely what they sought on an enduring basis, and that success was a result of plaintiffs' efforts and court-enforced victories rather than defendant's voluntary actions." *Id.* at 236.

Similarly, the Fifth Circuit, in *Dearmore v. City of Garland*, 519 F.3d at 522, found that a plaintiff was a prevailing party under § 1988 when plaintiff obtained a preliminary injunction enjoining enforcement of an

ordinance even where subsequent amendment of that ordinance mooted the plaintiff's claim.

More specifically, in *Dearmore*, the district court held that insofar as the challenged ordinance allowed inspections and searches of unoccupied property, it violated a property owner's Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* at 519. As a result, the district court issued a preliminary injunction enjoining the City from enforcing section 32.09(F) of the Ordinance, which required a property owner who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, or penalizes the lessor for refusing to allow an inspection. *Id.*

Later, the Garland City Council amended the ordinance, removing the provisions related to a nonresident owner's consent to the inspection of single-family rental properties and clarifying the circumstances under which the City may seek a warrant to inspect such properties when consent has been refused or could not be obtained. *Id.* at 520.

The district court dismissed the case, entered final judgment dismissing the case as moot and with prejudice, but nonetheless granted Petitioner's motion for attorneys' fees finding that Dearmore was a "prevailing party" under 42 U.S.C. § 1988(b). *Id.* Defendant appealed.

The Fifth Circuit affirmed, holding that final judgment and consent decrees are not the exclusive remedies that have sufficient judicial imprimatur under

Buckhannon. Id., *citing*, *Buckhannon*, 532 U.S. at 605 (referencing the judgment on the merits and consent decree as mere "examples").

Identically, the Ninth Circuit, in *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002) held that a preliminary injunction was sufficient under *Buckhannon* to confer prevailing party status on Plaintiff because of change in legal relationship even though the underlying case became moot. *Id.* at 1095. The Ninth Circuit specifically concluded that: "by obtaining the preliminary injunction, appellees 'prevailed on the merits of at least some of (their) claims.'" *Id.* at 1096. Additionally, the *Watson* court articulated that the plaintiff succeeded on a "significant issue in litigation, which achieve(d) . . . the benefit the parties sought in bringing suit" *id.*, and "the Ninth Circuit's previous dismissal of the appeal as moot and vacation of the district court judgment did not affect the fact that for the pertinent time period appellees obtained the desired relief." *Id.*

Petitioner's entitlement to "prevailing party" status is even stronger herein, since the Defendants' mooting actions followed the District Court's definitive summary judgment ruling on the merits, which was explicitly referred to in the legislators' explanations of the Bill being presented on the floor of the legislature.[4]

[4] The legislative history of SB 1445 shows not only that the absentee amendments were made only *after* the District Court ruled that the Election Code's absentee voting provisions were not constitutional, but that they were explicitly enacted *because* of it. When debate was held on SB1445, the sponsor clearly (Cont'd)

Indeed, the summary judgment entered here was much more compelling than any preliminary order found sufficient by other circuits. And, the relief changed the legal relationship between the parties because following the entry of summary judgment, Illinois no longer had constitutional absentee balloting procedures. The only reason that Defendants were able to "moot" the case is that the District Court mandated that new, constitutional procedures be implemented ahead of the final order. Simply amending the statute without court approval however, does not change the fact that Petitioner succeeded on the main tenet of the litigation – to have the law declared unconstitutional and to require Illinois election authorities to provide timely notice to absentee balloters and the opportunity to challenge any rejection of his or her ballot.[5]

(Cont'd)

mentioned that "this measure comes from [county] clerks across the state." (App. A to Appellee's Br. at p. 89). The Senate Transcript similarly shows the attribution, stating: "this comes from a court case in Lake County." (App. B to Appellee's Br. at p. 31)

[5] Indeed, the fundamental value of Plaintiff's efforts is shown in the record below that since the change, all voters – every one of them – who have received notice and chosen to contest their absentee ballot's disqualification have had their vote counted.

B. The First, Second, Sixth, Eleventh and D.C. Circuits Have Similarly Conferred Prevailing Party Status on Parties Even at Preliminary Order Stages.

The First, Second, Sixth, Eleventh and D.C. Circuits have also conferred prevailing party status to parties that have prevailed in obtaining preliminary injunctive relief.

In *Maine School Administrative Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 17 (1st Cir. 2003) (analogizing the Individuals with Disabilities Education Act fee shifting provisions to 42 U.S.C. § 1988), the First Circuit conferred prevailing party status to a party in an IDEA lawsuit where the party simply prevailed at the preliminary injunction stage where the opposing party capitulated, reasoning that a party may be considered "prevailing" even without obtaining a favorable final judgment on all (or even the most crucial) of her claims.

Similarly, in *Preservation Coalition of Erie County v. Federal Transit Admin.*, 356 F.3d 444, 451-452 (2d Cir. 2004) (analyzing *Buckhannon* in the context of an interlocutory order requiring a Supplemental Environmental Impact Statement ("SEIS")), the Second Circuit upheld prevailing party status where the plaintiff succeeded in compelling a SEIS report under threat of continuing injunctive relief and articulated that "[w]hile these orders were cited by the Court as examples of the types of actions that would convey the judicial

imprimatur necessary to a fee award, broader language in *Buckhannon* indicates that these examples are not an exclusive list." *Id.*

Also, in *Sandusky County v. Blackwell*, 191 Fed. Appx. 397 (6th Cir. 2006) (conferring prevailing party status on a plaintiff where the plaintiff succeeded in obtaining a preliminary injunction, following which the defendant submitted to a permanent injunction), the plaintiff was held to entry of prevail on the merits when his lawsuit forced the county to ensure that provisional voting in Ohio met the requirements and objectives in future elections for federal office in Ohio and where, like here it was "accomplished . . . solely as a result of [the] suit and [the] Court's orders." *Id.* at 399-400.

Similarly, the Eleventh Circuit, in *United States v. Flowers*, 281 Fed. Appx. 960,963 (11th Cir.) (in suit brought to hold that race-based hiring rule was unconstitutional), and Defendant supported the requested preliminary relief, held that even where the defendant agrees and supports the relief sought by the plaintiff from the very beginning, the plaintiff is considered a prevailing party. *Id.* (where defendants supported the change in law advocated by plaintiff and district court found that plaintiff made a separate contribution to the litigation and that contribution was a substantial force in the court's decision to suspend the statute).

Finally, the D.C. Circuit, in *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005) (affirming order of the district court finding that plaintiffs were prevailing parties where they succeeded on a motion for a preliminary injunction and defendant mooted case) also noted that: "we are not alone in the view that *Buckhannon* does not reject the possibility that preliminary injunctions may be sufficient in some certain circumstances to render plaintiffs 'prevailing parties' under federal fee-shifting statutes." *Select Milk Producers*, 400 F.3d at 946.

C. The Only Cases that Deny Prevailing Party Status to a Litigant Who Prevails at the Preliminary Injunction Stage Are Cases Where Preliminary Relief Does Not Bear on the Merits or Plaintiffs Ultimately Lost on the Merits.

Besides the Seventh Circuit, only the Fourth and Eighth Circuits arguably have not conferred prevailing party status on plaintiffs whose claim was mooted after a preliminary injunction. In *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002)(reversing the district court's finding of prevailing party status where defendant agreed not to seek reimbursement from plaintiff and subsequently changed the challenged policy), recipients of aid under the Aid to Families with Dependent Children (AFDC) program brought suit claiming that a new provision violated the Social Security Act, 42 U.S.C. §§ 601 *et seq. Id.* The Fourth Circuit refused to confer prevailing party status on the plaintiff because "[t]he proceedings below in this case present an example of the preliminary, incomplete nature of the merits examination and the inter-play between the 'likely

harms' and 'likelihood of success' factors in the preliminary injunction inquiry." *Id.* The Fourth Circuit found that the "likely harm" analysis weighed greatly in favor of the plaintiff such that the decision on the plaintiff's "likelihood of success" was diminished, making the preliminary injunction order in *Smyth* a harm-based rather than a merit-based decision. *Id.* Despite the Fourth Circuit's outlier decision, Zessar's case clearly prevailed on the merits.

Similarly, the Eighth Circuit refused to convey prevailing party status on a settling plaintiff, even where the district court approved a class settlement and retained jurisdiction to enforce the settlement. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (finding that only a consent decree was the needed judicial imprimatur to confer prevailing party status because the enforcing the settlement would require a separate breach of contract action).

Distinguishable also are decisions where plaintiffs obtained preliminary relief but ultimately lost on the merits.[6] *See Sole v. Wyner*, 127 S.Ct. 2188, 2190 (2007) (rejecting prevailing party status where the preliminary injunction hearing was granted one day after the plaintiff's complaint was filed and Plaintiff lost on the merits); *see also, Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 480 F.3d 734 (5th Cir. 2007)(refusing to confer prevailing party status on a litigant that obtained a preliminary injunction that was eventually reversed and dissolved.)

[6] In contrast, Petitioner here prevailed on the merits and ultimately obtained the review sought in his complaint; to be given notice of his ballot rejection and allowed an opportunity to contest.

II. The Seventh Circuit's Rule Perversely Discourages Victimized Parties from Bringing Meritorious Claims to Enforce the Constitution, and Encourages Defendants to Strategically Litigate all Claims, Regardless of Merit, As Long As Possible just before the entry of Final Judgment.

The Seventh Circuit's "final judgment" rule subverts § 1988's intended purpose to attract counsel to pursue these cases to vindicate civil rights violations.

The purpose of "prevailing party" status is to encourage victims of constitutional abuses to bring meritorious claims where the monetary damage was less often, much less than the legal fees to prosecute such a suit. Indeed, if counsel's successful efforts to oust an unconstitutional election regimen can be left unpaid by the sheer tack of defendants to litigating all claims until lost, but not formally *final*, there is no incentive for a municipality to act constitutionally until the last instant before final judgment and no incentive for counsel to take and pursue these actions for individuals who have been wronged.

In this case, Petitioner litigated and succeeded on the merits at the summary judgment stage, but was stripped of prevailing party status because of a post-summary judgment alteration of the challenged statute. The Seventh Circuit's holding deters and prevents future plaintiffs from obtaining counsel to challenge and prosecute constitutional wrongs, simply because the wrongdoer may moot a plaintiff's claim at the eleventh hour to avoid paying attorneys fees that produced that

alteration. The Civil Rights Attorney Fees Act of 1976 was enacted by Congress to help remedy constitutional wrongs, and the Seventh Circuit's decision eviscerates the procedural protections afforded to those whose rights are violated.

CONCLUSION

The Seventh Circuit's arbitrary bar to prevailing party status at any point prior to final judgment conflicts with the rule adopted in eight circuits that a party who achieves a favorable ruling on the merits may satisfy prevailing party status, even if the claim is subsequently mooted by defendant action.

This Court should grant the petition, hear the case and resolve the circuit conflict.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
JEFFREY M. SALAS
KRISLOV & ASSOCIATES
20 North Wacker Drive
Suite 1350
Chicago, IL 60606
(312) 606-0500

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED AUGUST 6, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 07-2899, 07-2913

BRUCE ZESSAR,

Plaintiff-Appellee,

v.

JOHN R. KEITH, ET AL.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 1917—**David H. Coar**, *Judge.*

ARGUED APRIL 3, 2008—DECIDED AUGUST 6, 2008

Before FLAUM, MANION, and TINDER, *Circuit Judges.*

MANION, Circuit Judge. After his absentee ballot was rejected in the 2004 general election, Bruce Zessar filed suit alleging that his due process rights were violated because election officials failed to provide him with notice and a hearing prior to rejecting his ballot. The district

court granted in part his motion for summary judgment, but before it entered final judgment, the Illinois General Assembly amended the portions of the state's Election Code addressing absentee voting. Notwithstanding this amendment, the district court entered final judgment in favor of Zessar declaring unconstitutional the Code as it stood prior to amendment. The district court also deemed Zessar a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988. The defendants appeal. Because we conclude that the amendment of the Election Code mooted Zessar's challenge to the pre-amendment Code, and that the district court's conclusion that Zessar was a prevailing party was in error, we vacate those portions of the judgment and remand for partial dismissal.

I.

Bruce Zessar resides and is registered to vote in Lake County, Illinois. Zessar submitted an absentee ballot intending to vote absentee in the general election held on November 2, 2004. His ballot was rejected because of a belief that the signatures on his absentee ballot application and ballot envelope did not match. Election officials concede that Zessar's vote was rejected in error, and did not count in the election. Making matters worse, Zessar was not notified that his ballot had been rejected until he received a postcard explaining the basis for the rejection in mid-January 2005. The parties agree that during the period between election day and the canvass, which was held on November 17, 2004, and rendered the election results

final, Zessar had no opportunity to challenge the rejection or otherwise rehabilitate his ballot.

The circumstances surrounding the rejection of Zessar's ballot arose under Article Nineteen of the Illinois Election Code, which covers absentee voting, as it stood in 2004. 10 ILCS 5/19-1 to 5/19-15 (2004). Voters began the process of voting absentee by filing an application with local election authorities for an absentee ballot. 10 ILCS 5/19-2 (2004). If the applicant was lawfully entitled to vote absentee in the requested location, election officials mailed the applicant a ballot. 10 ILCS 5/19-4 (2004). A voter who received an absentee ballot would fill it out, place it in a certified envelope, and either mail it to the clerk's office or deliver it in person. The clerk would then see that all such ballots were delivered to the appropriate precincts. 10 ILCS 5/19-8 (2004). Absentee ballots were not counted or otherwise verified before the evening of election day. On election day, however, the absentee ballot count began no later than 8:00 p.m. *Id.* Once the polls closed, election judges in each precinct cast the absentee ballots by opening the carrier envelopes containing the ballots, announcing each voter's name, and comparing the signature on the ballot envelope with that on the application. 10 ILCS 5/19-9 (2004). A ballot would be rejected in four circumstances: (1) if the signatures on the envelope and application did not match; (2) if the voter was not registered in the precinct; (3) if the envelope was open, or had been opened and resealed; or (4) if the voter voted in person during the day. *Id.* While the Election Code in effect in 2004 required

notification to absentee voters whose ballots were rejected, 10 ILCS 5/19-10 (2004), there was no requirement that the voters be notified in time to challenge the rejection before the canvass. In other words, sending Zessar notice in January 2005 that his ballot was rejected at the beginning of November 2004 violated no portion of the Illinois Election Code.

Zessar filed a class action complaint on behalf of himself and all other similarly situated voters against Willard R. Helander, Lake County Clerk, the members of the Lake County Board ("Helander," collectively), and the members of the Illinois State Board of Elections ("State Board"). Zessar alleged that the Election Code's failure to provide for notice and a hearing before the rejection of his absentee ballot violated his due process rights as protected by the Fourteenth Amendment to the United States Constitution.[1] On March 13, 2006, the district court entered an order denying the defendants' motion for summary judgment and granting, in part, Zessar's motion for summary judgment. The court determined that the Election Code's failure to provide for notice and a hearing violated the Due Process Clause, and that Zessar was entitled to prospective injunctive relief. The court also held that the economic damages

1. The district court certified both a plaintiffs' class, made up of Illinois registered voters whose submitted absentee ballots were rejected prior to the canvass without notice and a hearing, and a defendants' class, made up of all Illinois county election officials operating under the authority of the Illinois Election Code. For ease of discussion, we will refer to Zessar, the class representative, when speaking of the plaintiffs' class.

Zessar sought were not an appropriate remedy, and that any equitable relief beyond implementing a lawful absentee voting system was not warranted. The district court did not enter judgment on its ruling, however, instead directing the parties to file proposed procedures for providing notice and a pre-deprivation hearing to voters whose absentee ballots were rejected.

Three days later, Zessar filed an emergency motion for an injunction asking the district court to enjoin enforcement of the unconstitutional portions of the Election Code in the Illinois primary elections which were going to take place on March 21, 2006. For reasons not appearing in the record before us, that motion was denied on March 20, 2006. The district court also denied motions by the State Board and Helander to file interlocutory appeals of the ruling on the summary judgment motion.

While the parties' proposed procedures for handling absentee balloting were under consideration by the district court, the Illinois General Assembly passed Public Act 94-1000 ("Act") amending provisions of the Election Code such as the procedure for selecting election judges, 10 ILCS 5/13-1 (2006), handling challenges at polling places, 10 ILCS 5/18-5 (2006), and counting provisional ballots, 10 ILCS 5/18A-15 (2006). *See* Ill. Public Act 94-1000, § 5 (2006). More significantly for this case, the Act also amended the procedures for absentee voting. The amendments, which took effect on July 3, 2006, provided that if a mail-in absentee ballot was rejected for one of the reasons stated above, the

election authority had to notify the voter of the rejection "within 2 days after the rejection but in all cases before the close of the period of counting provisional ballots." 10 ILCS 5/19-8(g-5) (2006). This notice had to state the reason for the rejection, and notify the voter that he could appear before the election authority on or before the fourteenth day after the election to show cause why the ballot should not be rejected. *Id.* Review of the voter's challenge would be undertaken by a panel of three judges appointed for that purpose. *Id.* The judges could review the contested ballots, envelopes, applications, and any other evidence submitted by the voter. *Id.* The final determination on a ballot's validity was not reviewable, and ballots determined to be valid were added to the vote tally for their precincts. *Id.*

The defendants moved to dismiss Zessar's suit as moot based upon these amendments. Zessar opposed dismissal, and argued that the amendments did not moot the suit because they still did not provide sufficient due process to absentee voters. The district court denied the motion on October 10, 2006. In denying the motion, it expressed concern regarding absentee voters who would be absent from their precincts for an extended period of time, due to overseas deployment or otherwise, because they would be unable to appear in person before the three-judge panel. The court was also concerned that local election officials might not be prepared to implement the three-judge panels. On October 20, 2006, in anticipation of the upcoming election and echoing the concerns expressed by the district court, Zessar moved for an emergency injunction

prohibiting the defendants from rejecting any absentee ballots under the Election Code as it then stood. This motion was denied by the district court on October 26, 2006.

On June 11, 2007, the district court entered a final judgment containing four conclusions. First, the district court stated that "[t]he prior version of 10 ILCS 5/19-8 is unconstitutional because it failed to provide due process to the absentee voter." Second, the court concluded that Zessar qualified as a prevailing party based on its earlier partial grant of Zessar's motion for summary judgment and the Illinois General Assembly's subsequent amendment of the Election Code. Next, the court cited statistics from the 2006 election showing the large number of challenges brought by absentee voters whose ballots were rejected and the high rate of success they had in challenging rejection. Even though the court still entertained reservations about the sufficiency of the protections afforded to voters absent from their precincts for extended periods, the statistics did not reveal that any such voter attempted to challenge a ballot rejection. Accordingly, the court expressly declined to enter judgment that the post-amendment Election Code was unconstitutional. Finally, the court declined to enter judgment that election officials were required to use every available address (i.e., mail, email, and fax) to notify voters that their absentee ballot had been rejected, leaving to local election officials the determination of reasonable notification. The defendants filed motions for reconsideration of the court's determination that Zessar was a prevailing party, but the district court denied those motions.

Appendix A

Helander and the State Board filed separate appeals which have been consolidated for our review. Helander challenges the district court's substantive determination that the pre-amendment Election Code violated the Due Process Clause. The State Board argues that Zessar's challenge to the Election Code as it stood prior to its amendment in July 2006 was mooted by the Code's amendment. This mootness, the State Board argues, left the district court without jurisdiction to enter final judgment on the constitutionality of the pre-amendment provisions. Additionally, the State Board asserts that Zessar is not a prevailing party under 42 U.S.C. § 1988, and that the district court erred in declaring him such and awarding him attorney's fees. The district court's conclusions regarding the post-amendment Election Code have not been presented to us for review.

II.

It is fundamental to the exercise of judicial power under Article III of the United States Constitution that "federal courts may not give opinions upon moot questions or abstract propositions." *Protestant Mem'l Med. Ctr., Inc. v. Maram*, 471 F.3d 724, 729 (7th Cir.2006). Therefore, we must consider whether Zessar's due process challenge to the pre-amendment Election Code was rendered moot by the Code's amendment before taking up the issue of whether those provisions comported with constitutional due process requirements. *Id.* ("Mootness is one of the concepts that comprise the threshold issue of justiciability.") "Whether a case has been rendered moot is a question of law that

we review de novo." *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 928-29 (7th Cir.2003).

We have previously held that any dispute over the constitutionality of a statute becomes moot if a new statute is enacted in its place during the pendency of the litigation, and the plaintiff seeks only prospective relief.[2] *See MacDonald v. City of Chicago*, 243 F.3d 1021, 1025 (7th Cir.2001) (citing *Kremens v. Bartley*, 431 U.S. 119, 129, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977) ("[T]he enactment of the new statute clearly moots the claims of the named appellees.")); *see also Rembert v. Sheahan*, 62 F.3d 937, 940 (7th Cir.1995) ("When a challenged statute is repealed or significantly amended pending review, *and a plaintiff seeks only prospective relief*, a question of mootness arises.") (emphasis added). Thus, absent a lack of genuineness to the amendment as addressed below, the enactment of Public Act 94-1000 mooted the parties' dispute over the pre-amendment Election Code. In fact, that the dispute was moot seems to have been apparent to the parties and the district court during the proceedings below. Once the Code was amended in July 2006, the parties' motion practice turned to the constitutionality of the post-amendment

2. Zessar sought damages in his complaint, and if that claim was still pending it would have left alive the question of his entitlement to damages based on enforcement of the pre-amendment Code. However, the district court denied all relief other than "implementing a constitutional absentee voting system" when it granted in part Zessar's motion for summary judgment. Zessar did not appeal that decision.

Code. Similarly, the district court's denial of the defendants' motion to dismiss for mootness was based on its concerns about the constitutionality of the new provisions and whether election officials were actually going to implement them. The parties' concern with the Election Code as it stood when the suit was filed ceased until the district court entered judgment declaring that version of the Code unconstitutional.

What was true during the litigation below remains true on appeal. "[The] case-or-controversy requirement subsists through all stages of federal proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Another way to state the justiciability principles set forth above is that "Article III denies federal courts the power to decide questions that cannot affect the rights of the litigants in the case before them." *Id.* If we were convinced by Helander that the district court erred in concluding that the pre-amendment Code was constitutionally infirm, what relief could we afford the defendants? It is not as though we could order future elections to be carried out according to procedures the Illinois General Assembly amended in July 2006. Similarly, what benefit would Zessar gain by prevailing on his argument that the district court was correct? The parties' rights and obligations remain governed by the post-amendment Code regardless of our opinion about the constitutionality of provisions that ceased to have effect more than two years ago.

Appendix A

There is an exception to the rule that legislative correction of a challenged statute moots a challenge to the statute as it stood prior to amendment. Amendment or repeal of a challenged statute " 'does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 609, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). In other words, "when an intervening amendment provides no assurance that the complained-of conduct will cease, the case is not moot." *Rembert*, 62 F.3d at 941. Usually, however, legislative action will provide the assurance required by *Buckhannon*, because "when the defendants are public officials . . . we place greater stock in their acts of self-correction, so long as they appear genuine." *Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 492 (7th Cir.2004).

Zessar argues that his challenge to the pre-amendment Election Code is not moot because there is no assurance that Illinois will not reenact that version of the Code, and because the new provisions retain some of the previous infirmities. However, this case presents neither of the features that normally lead courts to discount the genuineness of an amendment, namely the enactment, or intended enactment, of the same statute, or a statute substantially similar to the one challenged. *See N.E. Fla. Chapter of the Assoc. Gen. Contractors of*

Am. v. City of Jacksonville, 508 U.S. 656, 662, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (concluding that the plaintiffs' challenge was not moot because the challenged statute was amended in insignificant ways and still disadvantaged the plaintiffs); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n. 11, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (noting that at oral argument the defendant announced its intention to reenact the challenged provision if the district court's decision was vacated). There is no evidence in the record that the defendants are lying in wait for vacatur of the district court's judgment so that they can reenact the Election Code as it stood prior to July 3, 2006.

Moreover, the amended Code is not substantially similar to the challenged provisions of the pre-amendment Code. The practice challenged by Zessar was the rejection of absentee ballots without notice and a hearing at which voters could challenge that rejection. That practice is remedied under the new version of the code. Zessar may disagree with the extent and sufficiency of the remedy, but the district court concluded that there was no ripe basis for challenging the new version of the Code, and Zessar did not appeal that decision. Because the post-amendment Code is not substantially similar to the provisions Zessar challenged in bringing suit, and there is no indication that the defendants plan to reenact the Code as it stood prior to amendment, Zessar's argument that his challenge to the pre-amendment Code remains live fails. *See Fed'n of Adver. Indus. Representatives*, 326 F.3d at 930 (noting that "repeal of a contested ordinance moots a plaintiff's

injunction request, absent evidence that the [defendant] plans to or already has reenacted the challenged law or one substantially similar").

We are cognizant of the resources that were invested, both by the district court and the parties, in litigating and ruling on Zessar's challenge to the pre-amendment Election Code. Those efforts, however, cannot maintain the challenge as a live controversy where it involves a statute no longer in existence and with no indication that the challenged practice will continue. We conclude that Zessar's challenge to the pre-amendment Election Code is moot. The district court's final judgment should be vacated to the extent that it passes judgment on the pre-amendment Election Code, and that portion of the case below should be dismissed as moot. *Miller v. Benson*, 68 F.3d 163, 165 (7th Cir.1995) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41, 71 S.Ct. 104, 95 L.Ed. 36 (1950)).

With our conclusion that Zessar's challenge to the pre-amendment Election Code is moot, the only issue remaining on appeal is whether the district court erred in naming Zessar a prevailing party. Courts are authorized to award reasonable attorney's fees to prevailing parties in suits, like this one, brought pursuant to 42 U.S.C. § 1983. 42 U.S.C. § 1988(b). It is well-established that "prevailing party" as used in federal fee-shifting statutes like § 1988 includes only those parties that have achieved a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605, 121 S.Ct. 1835. In other

words, "to qualify as a prevailing party, a civil rights plaintiff must obtain a least some relief on the merits of his claim." *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). While the district court's decision to award attorney's fees under § 1988 is usually reviewed for abuse of discretion, when that decision rests on the application of a principle of law, our review is de novo. *Fed'n of Adver. Indus. Representatives*, 326 F.3d at 932. We apply the latter standard here because we are presented with the legal question of how broadly to construe the statutory term "prevailing party."

A party is considered prevailing for § 1988 purposes when the court enters final judgment in its favor on some portion of the merits of its claims. *Buckhannon*, 532 U.S. at 605, 121 S.Ct. 1835 (citing *Farrar*, 506 U.S. at 113, 113 S.Ct. 566). Settlement agreements will not suffice to render a party prevailing unless they are made enforceable under a consent decree. *Id.* (citing *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)). Resolving a split among the federal courts of appeals, the Supreme Court in *Buckhannon* rejected as a basis for an award of fees the " 'catalyst theory,' which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601, 121 S.Ct. 1835. Rather, there must be a "judicial *imprimatur* on the change"; in other words, the judicial act must bring about "a corresponding alteration in the legal relationship of the parties." *Id.* at 605, 121 S.Ct. 1835.

The heart of the parties' dispute boils down to whether or not this case is controlled by our application of these principles in *Palmetto Properties, Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir.2004). The plaintiffs in *Palmetto* sought to open an adult entertainment nightclub. However, there were state and local zoning laws prohibiting operation of such an establishment within 1000 feet of, among other places, forest preserves, and the plaintiffs' proposed site was 735 feet from just such a location. *Palmetto*, 375 F.3d at 544-45. The would-be proprietors sued county officials alleging violations of the First and Fourteenth Amendments. *Id.* at 545. The parties filed motions for summary judgment, and the court issued an order concluding that the forest preserve portions of the zoning laws were constitutionally infirm, and enjoining their enforcement. *Id.* at 546. Instead of entering final judgment, however, the district court continued the case because the defendant informed the court that it did not intend to appeal the court's decision, but would amend or repeal the challenged provision. *Id.* The defendant made good on its promise to repeal the forest preserve portion of the zoning law, and the district court subsequently dismissed the case as moot. *Id.* The court then awarded the plaintiffs attorney's fees as prevailing parties over the objection of the defendant, and the defendant appealed. We affirmed noting that

> [i]t would defy reason and contradict the definition of "prevailing party" under *Buckhannon* and our subsequent precedent to hold that simply because the district court

> abstained from entering a final order formally closing the case-a result of the Defendant's assertions that it would repeal the challenged portion of the ordinance-Palmetto somehow did not obtain a "judicially sanctioned change" in the parties' legal relationship.

Id. at 549-50.

While this case is distinct from *Palmetto* in a number of ways which we address below, we begin with one obvious way it is similar—after finding a statute unconstitutional, the district court did not enter final judgment before the challenged provision was amended or repealed. This situation gives a plaintiff a hurdle to overcome if he is to show that he is a prevailing party because the Supreme Court has repeatedly held that, other than a settlement made enforceable under a consent decree, a final judgment on the merits is the normative judicial act that creates a prevailing party. *See Sole v. Wyner*, __ U.S. __, 127 S.Ct. 2188, 2196, 167 L.Ed.2d 1069 (2007) (declining to bestow prevailing party status on a plaintiff whose motion for preliminary injunction was granted but who failed to prevail on the merits); *Buckhannon*, 532 U.S. at 605, 121 S.Ct. 1835 (noting that the Supreme Court has "only awarded attorney's fees where the plaintiff has received a judgment on the merits, or obtained a court-ordered consent decree") (citations omitted); *Hewitt v. Helms*, 482 U.S. 755, 758-62, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) (concluding on successive appeal that the plaintiff was not a prevailing party *797 despite a court of appeals

holding that his due process rights were violated because the appellate court left it to the district court to fashion relief and the district court determined that the defendants were entitled to qualified immunity).

We did not undercut this final judgment requirement in *Palmetto*, but rather applied it based on the finality surrounding the district court's order granting a motion for summary judgment. There, the court's ruling was succinct and easily enforceable-the forest preserve provision was unconstitutional, and the defendants were enjoined from enforcing it. *Palmetto*, 375 F.3d at 546. Moreover, all parties were in agreement regarding the finality of the court's decision as evidenced by the defendant's statement of its intention not to appeal and its request for a continuance to amend or repeal the stricken provision. Finally, as we noted repeatedly throughout our decision, the district court's forbearance from entering final judgment resulted from the defendant's representation that it was going to repeal the forest preserve provision. *See, e.g., id.* at 549, 550, 551.

Here, the district court's partial grant of summary judgment lacked the finality exhibited in *Palmetto*. Upon entering its decision regarding the constitutionality of the pre-amendment Election Code, the district court directed the parties to submit proposed procedures for providing timely notice and pre-deprivation hearings to absentee voters whose ballots were rejected. There was no way to enforce this grant of partial summary judgment because the defendants were not directed to

do, or refrain from doing, anything. *See Farrar*, 506 U.S. at 111-12, 113 S.Ct. 566 (holding that a plaintiff prevails when the relief afforded modifies "the defendant's behavior in a way that directly benefits the plaintiff"). In fact, Zessar attempted to have the decision enforced when he asked the court to enjoin the defendants from rejecting absentee ballots, without notice and a hearing, in the Illinois primary set to occur on March 21, 2006. The district court denied the motion, and the primary was held under the challenged procedure. Moreover, the defendants here never indicated any intention to implement the findings of the court through amendment, repeal, or otherwise. Instead, they sought leave from the district court to file an interlocutory appeal of its order. The lack of enforceable terms and disputed nature of the district court's partial summary judgment order distinguish it materially from that in *Palmetto*.

Additionally, when the plaintiffs in *Palmetto* prevailed at the summary judgment stage and the defendant repealed the forest preserve provision, the defendant removed "the only provision which effectively prevented [the plaintiffs] from operating [their] nightclub," *Palmetto*, 375 F.3d at 549, leaving the plaintiffs free to move ahead with their plan. *Id.* at 546. Here, Zessar himself did not believe the amendments to the election Code afforded him the relief he sought. He instead challenged the new Code's constitutionality, asking the court to enjoin its enforcement in the 2006 election, and later seeking judgment that the new provisions did not provide sufficient due process.

His dissatisfaction with the amendments notwithstanding, Zessar argues that they qualified him as a prevailing party because they were enacted not only following the district court's partial summary judgment order, but because of it. In support, Zessar points to statements made during the floor debate in the General Assembly that the amendment originated "from clerks across the state," and "comes from a court case held in Lake County." It is true that the district court's partial summary judgment order likely put the interested parties on notice that a change in absentee voting was coming. However, as we already noted, the defendants had not been ordered to do, or refrain from doing, anything. Rather, at the time the General Assembly enacted Public Act 94-1000, which included other Election Code amendments unrelated to those of Article Nineteen, it was still acting on its own volition in response to the proceedings in the lawsuit. *See Buckhannon*, 532 U.S. at 605, 121 S.Ct. 1835 ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.").

In sum, our decision in *Palmetto* should be read in conjunction with the principles set forth by the Supreme Court and our prior cases for determining when a plaintiff is a prevailing party for the purpose of awarding attorney's fees under § 1988. Normally, such a determination will require a final judgment on the merits or a consent decree. *Id.* Cases will sometimes arise where, despite there being no final judgment or consent

decree, the legal relationship of the parties will be changed due to a defendant's change in conduct brought about by a judicial act exhibiting sufficient finality. *Palmetto* was such a case. This is not, and we therefore reverse the district court's determination that Zessar was a prevailing party entitled to attorney's fees under § 1988.

III.

We conclude that the amendment of the Illinois Election Code by the Illinois General Assembly in Public Act 94-1000 mooted Zessar's challenge to the Code as it stood prior to the amendment. There is nothing in the record indicating that the amendment was not genuine, nor that the defendants intended to return to the challenged practice. Additionally, we conclude that Zessar did not achieve a judicially sanctioned change in his legal relationship with the defendants, and that the amendment of the Election Code was a multi-faceted change initiated by the General Assembly partially in response to Zessar's lawsuit. Accordingly, the district court's judgment is VACATED to the extent it passed on the constitutionality of the Illinois Election Code as it stood prior to July 3, 2006, and to the extent it declares Zessar a prevailing party entitled to fees under 42 U.S.C. § 1988. WE REMAND with instructions to dismiss Zessar's challenge to the pre-amendment Election Code as moot.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION FILED JUNE 11, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05 C 1917

BRUCE M. ZESSAR,

Plaintiff,

v.

WILLARD R. HELANDER,
Lake County Clerk, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

FACTS

The facts stated in this court's March 13, 2006 summary judgment opinion are hereby incorporated. On March 13, 2006, this court concluded that the Illinois Election Code provisions regarding the casting of absentee ballots violated absentee voters' due process rights, and that the implementation of a constitutional

absentee voting system would be a proper remedy. On July 3, 2006, the Illinois General Assembly passed Public Act 94-1000, revising the Illinois Election Code, to provide prompter notification of rejected absentee ballots, and a chance for an in-person hearing before the election to rehabilitate the ballot.

Specifically, P.A. 94-1000 provides that within two days of receipt of a mailed-in-absentee ballot, an election judge or official shall compare the signatures. If the signatures match, and the absentee voter is otherwise qualified to cast an absentee vote, the vote shall be counted. If the signatures do not match, or there is some other reason for disqualification, the ballot is rejected. Within two days of the rejection, the election authority must notify the absentee voter of the rejection and inform the voter of the reason or reasons the ballot was rejected. The notice must also explain that the voter may appear before the election authority, on or before the 14th day after the election, to show cause for why the ballot should not be rejected. The election authority shall appoint a panel of three election judges to review the contested ballot, application, and certification envelope, as well as any evidence submitted by the absentee voter. No more than two election judges on the reviewing panel shall be of the same political party. The panel's determination is final, not subject to review by administrative or state courts.

After the passage of P.A. 94-1000, Defendants moved to dismiss the case as moot. This court denied the motion on October 10, 2006, indicating that it is unclear whether

the new statute would provide a constitutional voting system. Specifically, this court was concerned with (1) the individuals who are absent from the state during the period that covers the in-person absentee voting dates, as well as the dates available for the pre-deprivation hearing before the three election judges-these individuals are denied the opportunity to be heard prior to the final canvass, because he or she would be unable to appear in person; and (2) whether the state was prepared to implement the three-judge panel review system.

On October 26, 2006, this court denied Plaintiff Class' motion for preliminary injunction, unwilling to issue an injunction that presupposes the inadequacy of procedures yet to be developed. The general election was held in November 2006 under the revised election system of P.A. 94-1000. Statistics from the November election were submitted to this court.

On April 30, 2007, Plaintiff Class filed its Submission for Final Judgment. Plaintiff Class claims no further proceedings are needed, and moves the court to enter a final judgment as follows:

> a) judgment that the prior version of 10 ILCS 5/19-8 is unconstitutional because it failed to provide due process to the absentee voter;
>
> b) judgment that the newly enacted provision of the Illinois Code, while making improvements,

remains unconstitutional by requiring "in person" presentation of proof from absentee voters absent from their precinct well beyond election day;

c) judgment that the election authority shall use all available addresses in its possession (mail, email, and fax) to notify voter of rejection; and

d) judgment that Plaintiff and the Class are "prevailing parties" and award appropriate fees and costs.

ANALYSIS

A. Judgment that the prior version of 10 ILCS 5/19-8 is unconstitutional because it failed to provide due process to the absentee voter

This court has already ruled on the constitutionality of the absentee ballot provisions of the Illinois Election Code before July 30, 2006 in the previous summary judgment opinion. In the March 13, 2006 opinion, this court ruled in favor of the Plaintiff Class, finding that the lack of opportunity for a pre-deprivation hearing before final canvass violated the absentee voter's due process rights. This court incorporates the summary judgment finding in this final judgment.

Appendix B

B. Judgment that the newly enacted provision of the Illinois Code, while making improvements, remains unconstitutional by requiring "in person" presentation of proof from absentee voters absent from their precinct well beyond election day

Plaintiff requests this court to rule that the newly enacted absentee voting provisions remain unconstitutional, because of the "in-person appearance" requirement. In the November 2006 General Election, the data showed that of the 1139 rejected ballots, 116 absentee voters sought review (approx.10%), and 115 were found valid. In the November 2006 General Election, 671 Military/Overseas absentee ballots were rejected, 13 sought review (approx.2%), and all 13 were counted after review. Plaintiff Class seems to suggest that this discrepancy (10% and 2%) is due to the "in person" appearance requirement, which may discourage overseas absentee voters with rejected ballots from seeking review. Plaintiff Class proposes that rejected voters should be able to submit an affidavit, copy of an existing government issued ID card or similar proof via fax or U.S. mail as an alternative to an "in person" appearance.

Defendants assert that the statistics show that the local election authorities have implemented the absentee voting procedures to statutory standards, where those who sought review received a pre-deprivation hearing and ruling. Many of the rejected absentee ballots were subsequently found valid, showing that the newly enacted pre-deprivation review procedures were

serving their statutory function. Defendants argue that the statute is not unconstitutional on its face, and further, because there is no concrete case of a distant absentee voter requesting review, the issue is not ripe before this court.

The information before the court does not reveal any distant or overseas absentee voter who is unable to challenge his or her rejected ballot in the present case. The Plaintiff Class has supplied no evidence of such a case. This court does not take up hypothetical issues dealing with abstract circumstances and intangible injuries. Further, although this court has reservations about the implementation of procedures for rejected absentee ballots from overseas absentee voters, it is inappropriate for this court to presuppose the inadequacy of procedures yet to be developed. This court agrees that the local election authority should have an opportunity to address the issue of rejected absentee ballots from overseas, and be afforded the chance to work out the practical implementation of the statute without precipitous court intervention. If a concrete case arises with actual injury, it may then be appropriate and ripe for adjudication. In the present case, this court declines to award judgment that the newly enacted provision of the Illinois Code is unconstitutional.

C. Judgment that the election authority shall use all available addresses in its possession (mail, email, and fax) to notify voter of rejection

Plaintiff Class asserts that election authority should be instructed to use all available means to contact voters-including email, phone and fax, if provided on the absentee ballot envelop. Plaintiff Class cites to *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708, 1713, 164 L.Ed.2d 415, where the Supreme Court held that when notice by registered mail of a tax sale is returned unclaimed, a state must take additional reasonable steps to provide notice to the property owner before selling the property. In *Jones*, the Supreme Court found that the returned registered mail attempt was inadequate, but declined to "prescribe the form of service or notice that the government should adopt." *Id.* at 1721. The Court specifically stated that it would not attempt to "redraft the State's notice statute," and that the "State can determine how to proceed in response to our conclusion that notice was inadequate." *Id.*

Consistent with the *Jones* approach, this court declines to prescriptively require a specific notification process. The practical application of "reasonable" notification for the rejected absentee ballots is properly left to the local election authorities. This court will not assume that local election officials will apply the "reasonable notice" requirement in a manner inconsistent with their duties.

D. Judgment that Plaintiff and the Class are "prevailing parties" and award appropriate fees and costs

Under 42 U.S.C. § 1988, a "prevailing party" is entitled to "a reasonable attorney's fee." *Farrar v. Hobby,* 506 U.S. 103, 109, 113 S.Ct. 566, 121 L.Ed.2d 494 (U.S.1992). In *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, the Supreme Court held that when a defendant voluntarily mooted the action, where there was no change in legal relationship between the parties, the plaintiff was not considered a prevailing party and, therefore, was not entitled to attorney's fees. 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (U.S.2001). The Seventh Circuit further narrows *Buckhannon* in *Palmetto Props., Inc. v. County of Dupage,* 375 F.3d 542, 549 (7th Cir.2004). In *Palmetto,* the plaintiff strip club challenged the constitutionality of a county ordinance. The district court held that certain provisions in the ordinance were unconstitutional, granting a partial summary judgment in favor of the plaintiff. The defendant county repealed the offending portion after the court's summary judgment opinion, and the case was subsequently dismissed as moot. The Seventh Circuit determined that in such a case, where the district court ruled on the substantive merits of the case in the plaintiff's favor (i.e. that the certain provisions were unconstitutional), and the defendant changed the law after the court's determination, presumably because of it, the plaintiff is deemed to be the "prevailing party."

Appendix B

The Seventh Circuit distinguishes *Palmetto* from *Buckhannon, T.D. v. La Grange Sch.* Dist. No. 102, 349 F.3d 469 (7th Cir.2003), and *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago,* 326 F.3d 924, 932 (7th Cir.2003). In *Buckhannon,* the state legislature repealed the contested provision while discovery was still pending and prior to any substantive judicial determinations. Without a judgment on the merits, there is no change in legal relationship, and the plaintiff was not deemed a prevailing party. *Palmetto,* 375 F.3d 542, 547. In contrast, in *Palmetto,* the County repealed the ordinance only after the district court made a judgment on the merits in a partial summary judgment opinion, finding that a portion of the County's adult-entertainment zoning ordinance to be unconstitutional. The repeal of the ordinance addressed the very issues that the court found unconstitutional, and thus it is presumed that the repeal of the ordinance was made because of the court determination. *Id.* at 550. In *T.D.,* the Seventh Circuit concluded that a court-sponsored private settlement was insufficient to convey prevailing party status. This is distinguishable from *Palmetto,* as the repeal of the ordinance came presumably as a result of a substantive judgment on the merits, and not a private settlement. Finally, in *Federation,* it was held that when a favorable district court judgment is reversed (except for one small provision), the plaintiff loses its prevailing party status as a result of the reversal. *Id* at 549.

The instant case is most similar to *Palmetto.* Unlike *Buckhannon,* this court has made a substantive ruling

on the merits, finding that certain absentee voting procedures under the Illinois Election Code violated the absentee voters' due process rights. It was only after this court's judgment that the state legislature amended the Code. Specifically, P.A. 94-1000 revised the Illinois Election Code to address the constitutionality issues raised in the summary judgment opinion. The facts of this case make *Palmetto* directly applicable. Further, no private settlement or reversal has taken place, rendering *T.D.* and *Federation* inapposite at this time. Thus, relying on Seventh Circuit precedent, this court finds that the Plaintiff Class in this case qualifies for prevailing party status. Reasonable attorney fees and costs are awarded to the Plaintiff Class under 42 U.S.C. § 1988. The parties shall proceed to meet and confer in an effort to reach agreement as to the amount of fees in accord with the procedures set forth in Local Rule 54.3(d). In the event that no agreement is reached as to all matters concerning fees, a motion for fees may be filed by no later than 90 days from the date of this order.

CONCLUSION

This court enters final judgment that the prior version of 10 ILCS 5/19-8 is unconstitutional because it failed to provide due process to the absentee voter, in accordance with the summary judgment opinion of March 13, 2006; and that Plaintiff Class qualifies as "prevailing parties", such that reasonable fees and costs are awarded.

Appendix B

This court declines to enter judgment that the newly enacted provision of the Illinois Code is unconstitutional; or that the election authority shall use all available addresses in its possession (mail, email, and fax) to notify voter of rejection.

Enter

/s/ David H. Coar
David H. Coar
United States District Judge

Dated: **June 11, 2007**

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 7, 2008

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 7, 2008

Before

Joel M. Flaum, *Circuit Judge*

Daniel A. Manion, *Circuit Judge*

John Daniel Tinder, *Circuit Judge*

Nos. 07-2899 & 07-2913

Bruce Zessar, et al.,

Petitioner-Appellee,

v.

John R. Keith, et al.,

Defendants-Appellants.

Appendix C

Appeal from the United States
District Court for the Northern District
of Illinois, Eastern Division

No. 05 C 1917

David H. Coar, *Judge*

ORDER

On consideration of the petition for rehearing en banc filed by petitioner-appellee, and the answer thereto, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny rehearing. The petition is therefore **DENIED**.